No. 91-1091

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IN THE

Supreme Court of the United States

October Term, 1991

ALCAN ALUMINIO DO BRASIL, S.A.,
Petitioner,

vs.

GERTRUDIS ROBLES PEREZ, ADRIAN ROMAN,
AND IRIS B. TORRES PAGAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PUERTO RICO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Superior Court of Puerto Rico improperly exercised *in personam* jurisdiction over petitioner Alcan Aluminio do Brasil, S.A. ("Alcan"), a non-resident foreign national, where there was no evidence to establish that Alcan conducted business in Puerto Rico or had minimum contacts with the forum necessary to satisfy the traditional notions of fair treatment and equal justice guaranteed by the Fourteenth Amendment to the United States Constitution, and where the only possible basis for jurisdiction was preliminary and inadmissible evidence that Alcan knew that its product would be sold in Puerto Rico.

RULE 29.1 STATEMENT

Petitioner Alcan is a Brazilian corporation and has no United States subsidiaries. However, Petitioner does participate in the ownership of two foreign corporations, which are the following:

Mineracao Rio do Norte, S.A.,
Rio de Janeiro, R.J., Brasil

Petrocoque S.A.-Industria e Comercio,
Cubatao, S.P. Brasil

Petitioner Alcan is a wholly-owned subsidiary of Alcan Aluminum Limited, a Canadian Corporation.

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OPINIONS BELOW

The Opinion of the Superior Court of Puerto Rico, Utuado Section, denying Alcan's Motions to Dismiss and holding that Alcan was amenable to personal jurisdiction in Puerto Rico, is reprinted in the attached Appendix at A1-A7. The judgment of the Superior Court of Puerto Rico is reprinted in the Appendix at A11-A27. Alcan's Request for Review to the Superior Court of Puerto Rico was denied by Order dated October 23, 1991, and is set forth in the Appendix at A53-A55.

JURISDICTION

The judgment of the Superior Court of Puerto Rico was entered on June 28, 1991. A Request for Review to the Supreme Court of Puerto Rico was denied on October 23, 1991. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §§1254(1), 1257 and 1258, and in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The complaints in these consolidated product liability actions filed by Gertrudis Robles Perez, Adrian Roman and Iris B. Torres Pagan ("Respondents") allege injury as a result of an explosion of a "Rochedo" brand pressure cooker manufactured by Alcan Aluminio do Brasil, S.A. ("Alcan"). The respondents, citizens of Puerto Rico, purchased the pressure cookers from B & B de Lares, Inc. ("B & B"), a company organized under the laws of Puerto Rico, with its principal place of business in Puerto Rico.

Respondents filed their complaints on August 4, 1984 against Alcan, B & B and Group Brazil, Inc., B & B's insurance company. B & B, in turn, filed a cross-claim[1] against Alcan on November 8, 1984, serving process on June 26, 1985. Respondents never served the original complaints upon Alcan.

Alcan filed a motion to dismiss the cross-claim on January 17, 1986, and moved to dismiss the respondents' complaints on February 9, 1987. The grounds for the motions were simple and straightforward: Alcan was not amenable to personal jurisdiction in the Superior Court of Puerto Rico. Alcan was a Brazilian corporation with its principle place of business in Brazil. It did not have an agent, an office, or even a representative in Puerto Rico. Nor did it have real estate or personal property within the jurisdiction. Most importantly, Alcan did not conduct business with or in Puerto Rico at any time. In short, Alcan had no "minimum contacts" with Puerto Rico.

B & B subsequently dismissed voluntarily and with prejudice its cross-claim against Alcan.[2] The court

[1] The cross-claim of B & B against Alcan was, in reality, a third-party complaint, since Alcan was never served with process of the complaints by respondents.

[2] Respondents withdrew with prejudice their complaints against B & B on August 16, 1990.

denied Alcan's motions to dismiss the complaints by order dated November 21, 1986, and the cases proceeded to trial on August 16, 1990. Respondents presented no evidence whatsoever relative to the court's exercise of personal jurisdiction over Alcan. Nonetheless, the court exercised *in personam* jurisdiction over Alcan and rendered a judgment for damages in favor of respondents. (Judgment, A11-A27.) Alcan's timely Request for Review to the Supreme Court of Puerto Rico was denied by Order dated October 23, 1991. (Resolution, A53-A55.)

The only possible basis for the Superior Court of Puerto Rico to exercise jurisdiction over Alcan was:

> proposed evidence, [that] it exported the "Rochedo" brand pressure cookers, object of the present controversy, knowing that a great number of these pots, would be sold in Puerto Rico.

(Resolution, A5.) The court subequently determined that the proposed evidence presented by B & B was "preliminary in nature, not admissible and aimed at establishing that Group Brazil, Inc. (defendant against whom B & B de Lares itself dismissed voluntarily and with prejudice) was doing business in Puerto Rico." (Judgment, A19.)

Thus, the Superior Court of Puerto Rico exercised *in personam* jurisdiction over Alcan despite the undisputed fact that it had no minimum contacts with Puerto Rico. The court ignored well-established precedent and, in so doing, misapplied the doctrine of *in personam* jurisdiction in an international context. Alcan respectfully requests this Honorable Court to grant its Petition for a Writ of Certiorari to establish needed predictability in the state of the law, and to secure uniformity of decisions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT ALCAN'S PETITION FOR A WRIT OF CERTIORARI BECAUSE THE LAW INVOLVING THE EXERCISE OF PERSONAL JURISDICTION AS APPLIED IN THE CONTEXT OF NON-RESIDENT FOREIGN NATIONALS IS INCONSISTENTLY APPLIED AND THIS COURT'S REVIEW COULD BRING NEEDED PREDICTABILITY TO THE STATE OF THE LAW.

A. This Case Presents For Review The Question Left Open In The *Asahi Metal Industry Co. v. Superior Court of California* Decision Which Has Done Little To Establish A Predictable Basis For Applying The Doctrine Of *In Personam* Jurisdiction In An International Context.

In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), this Court granted certiorari and directly addressed the issue of the constitutional limitations on the exercise of personal jurisdiction over foreign nationals. In *Asahi*, this Court held that a non-resident foreign national, Asahi, was not subject to the jurisdiction of the United States courts based on knowledge that its products would be sold in a world market because to do so would be unreasonable. *Id.* at *Syllabus*. The case *sub judice* presents for this Court's review the significant and unresolved question of whether the mere placement of a product into the stream of commerce is sufficient to satisfy Due Process requirements if the manufacturer has knowledge that its product is destined for an international market. This Court struggled with this same issue in *Asahi* and was unable to reach an unanimous decision.

Asahi manufactured tire valves in Japan and sold them to a Taiwanese tire manufacturer whose tires ultimately were placed on a Honda motorcycle. The tire valves allegedly caused injury in the State of California. Although in *Asahi* this Court determined that the exercise of jurisdiction over a foreign national would be unreasonable and unfair, it was suggested that such a burden could be justified based on "the interests of the plaintiff and the forum . . ." *Id.* at 114. This Court went on to resolve the jurisdictional issue on the unique facts of that case, stating:

> Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan.

Id. at 115.

Notwithstanding the unique procedural context of the *Asahi* case, one could legitimately ask why the law of any one of the United States should ever govern a commercial transaction that takes place wholly outside of the United States, regardless of whether the purchaser then moves the goods directly or indirectly into the United States, and regardless of who the plaintiff is. The interests of a potential plaintiff or a forum in the exercise of jurisdiction over a foreign national should never, in Alcan's view, "justify even the serious burdens placed on the alien defendant." *Id.* at 114.

The flip side of the question is, of course, whether the United States citizens who design, manufacture, sell, and/or deliver products in the United States, knowing that these products are destined for a world market, are subjecting themselves to the law and jurisdiction of foreign courts. *Asahi* answered none of these important

questions and, in fact, a review of the post *Asahi* cases (including this one) demonstrates that this Court's prior decision in this area has done little to clarify the law or secure uniformity of decision. The result has been a melange of cases whose hallmark characteristic is inconsistency.

B. The Post-Asahi Cases Presage The Result In This Case Where The Court Exercised Jurisdiction Exclusively On The Basis Of Alleged Knowledge That The Product At Issue Would Enter The United States.

A review of the cases decided after this Court's decision in *Asahi, supra,* illustrates that there is substantial confusion over what is necessary to assert jurisdiction. Some courts have held that the existence of a United States subsidiary is enough, notwithstanding the well-recognized principle that operating through a subsidiary should insulate a parent from jurisdiction in the United States. *See, e.g., Dittman v. Code-A-Phone Corp.*, 666 F. Supp. 1269 (N.D. Ind. 1987). Other cases rely on the fact that a product was designed for a world-wide market, which satisfies minimum contact requirements.

For example, in *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 1990 U.S. App. Lexis 10499 (8th Cir. 1990), the Eighth Circuit reversed the district court and held that a Japanese company who manufactured allegedly defective mining cams for a U.S. contractor that incorporated them into machines installed in North Dakota did not have sufficient contacts with North Dakota to satisfy Due Process requirements, even though it knew the cams were manufactured in accordance with U.S. specifications and that the U.S. contractors sent representatives to Japan to inspect the

work. The Eighth Circuit applied *Asahi*, a third-party action, to a direct product liability claim and is therefore analogous to and in direct conflict with the present case.

In contrast, several district courts have asserted jurisdiction over multinationals even though their contacts were quite minimal. In *Albun v. General Electric Co.*, 735 F. Supp. 1479 (D. Guam 1990), the court held that the exercise of personal jurisdiction over an American corporation satisfied the Due Process clause because the corporation, Monsanto, purposefully availed itself of the distribution capacity of its industrial customers to do business in Guam where those customers distributed their downstream products. The court refused to follow the rejection of the "stream of commerce" theory adopted in Justice O'Connor's plurality in *Asahi*, instead relying on a "reasonableness" test derived from Justice Steven's concurrence.

Similarly, in *Dougherty v. Royal Zenith Corp.*, 1990 U.S. Dist. Lexis 5386 (E.D. Pa. May 3, 1990), the court applied Justice Brennan's dissent in *Asahi*, finding that because an East German third-party defendant manufacturer of printing presses was aware that its products were regularly sold in the United States, assertion of personal jurisdiction satisfied Due Process. In *Felty v. Conaway Processing Equipment Co.*, 1990 U.S. Dist. Lexis 6493 (E.D. Pa. May 30, 1990), the district court distinguished *Asahi*, finding that personal jurisdiction could be asserted over a Dutch poultry processing machine manufacturer that had few, if any, direct contacts with Pennsylvania. The court relied on the fact that the defendant used U.S. distributors to deal in the international market for poultry processing equipment and was aware that its equipment was sold for use in the United States.

Other districts too numerous to recite have reached conflicting results.[3] The level of contradiction and confusion can best be illustrated by reviewing three cases in detail: the case *sub-judice*, its sister case, *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26 (1st Cir. 1988) *cert. denied*, 489 U.S. 1018 (1989), and *Parry v. Ernst Home Center Corp., et al.*, 779 P.2d 659 (Utah 1989). Each of these three cases illustrate two fundamental problems. First, as between the present case and *Benitez-Allende*, two different courts applying the same law to essentially the same method of marketing and distribution, apply two different legal standards. Although both courts reach the same results, this can be explained because the trial court in this case apparently would always find jurisdiction where a foreign product allegedly causes injury, even in the context of the *Asahi* and *Parry* facts. In short, these cases illustrate that there is no doctrinal consistency in the law.

When the present case and *Allende* are contrasted with *Parry*, the second problem with the present state of affairs becomes evident. *Parry* demonstrates clearly that there is no factual consistency among the cases.

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[3] *See, e.g., Graham v. Machinery Distribution, Inc.*, 1991 Pa. Super. Lexis 3343 (a foreign manufacturer whose products were purchased by a foreign company and sold to a U.S. distributor lacked sufficient contacts for jurisdiction); *Warzynski v. Empire Comfort Systems, Inc.*, 102 N.C. App. 222, 401 S.E.2d 801 (N.C. App. 1991) (a foreign manufacturer who entered into a sales agreement with an American corporation subjected itself to personal jurisdiction); *Keen v. Ashot Ashkelton, Ltd.*, off'l. cite, 748 S.W.2d 91 (Tex. 1988) (a foreign manufacturer of parts is amenable to jurisdiction when its product is reasonably expected to enter into the stream of commerce); and *Felix v. Bomoro Kommanditgesellschaft*, 198 Cal. App. 3d 106, 241 Cal. Rptr. 670 (1987) (a foreign parts manufacturer did not have sufficient contact with the forum state when its product came into the forum state as part of another foreign manufacturer's finished product).

A doctrinal inconsistency in the present case and *Allende* arise from essentially the same distributing mechanism; *i.e.*, that Alcan Aluminio do Brasil, S.A. produces pressure cookers for a world-wide market. However, Alcan in both cases intentionally limited its marketing program to informing potential customers of the availability of its product for purchase and delivery *in Brazil.*

The First Circuit in *Allende* attempts to characterize the Alcan marketing effort as an active attempt to sell its product in Puerto Rico citing two facts in addition to the physical existence of pressure cookers in Puerto Rico: (1) the fact that Alcan had an "export advisor", and (2) that the "export advisor" travelled to Puerto Rico to meet with a Florida resident who was a sales representative. The court in this case, in contrast, had no such evidence and did not require these two factual elements as a necessary part of its analysis for jurisdictional purposes.[4]

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[4] The export advisor, as described by the court in *Allende*, is nothing more than the marketing manager for the non-Brazilian market. Such an individual is a common feature of virtually every significant company selling in the world market; which is rapidly replacing more traditionally-limited markets. Even if a company wished to limit the market for its product, the influx of foreign competition in virtually every commodity makes that less and less possible.

Some commentators have even argued that corporate nationality is on the wane so that corporations such as General Electric or General Motors cannot properly be referred to as U.S. Companies; they are simply global companies in which national identity is playing an increasingly less significant role. Accordingly, as we are continually confronted with a global market, most companies will have market managers whose responsibilities will include markets other than the jurisdiction in which they are based. Thus, the fact that Alcan had a market manager whose responsibilities were not limited to Brazil is not a distinguishable fact.

(Footnote continued on following page.)

In addition, the First Circuit has reached opposite conclusions in similar cases. In *Prizzaro v. Hotels Concorde International,* 1990 U.S. App. Lexis 11794 (1st Cir. July 11, 1990), for example, the First Circuit held that an alien qualified to do business in Florida and with an office in Florida was not subject to jurisdiction in Puerto Rico, although it actively advertised and solicited customers in Puerto Rico. Although the First Circuit focused on the fact that the plaintiff's injury occurred in Aruba, in economic terms, the facts are the same as in the present case. The only difference is that in one case the injured plaintiff is directly purchasing a service abroad, and in the other case, an intermediate purchases a product abroad.

In *Prizzaro,* connections to the U.S. are considerably more-established than in this case. Yet, the court reached the inconsistent conclusion that the alien was not amenable to jurisdiction. For example, if one assumes that while in Aruba the plaintiff received negligent exercise training and as a result of implementing that training after his return to Puerto Rico the plaintiff is injured, the legal principle articulated by the First Circuit in *Prizzaro* and the doctrine in this case and *Allende* give disparate and inconsistent results.

In short, even though two courts looking at the same transaction developed different doctrines for asserting jurisdiction—one being the existence of the product

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(Footnote continued from preceding page.)

Moreover, the fact that Alcan's marketing manager had a meeting with a sales representative in Puerto Rico is of even less significance. The location of a meeting in a global, jet and telecommunications based economy is most often one of convenience and of little else. It is inconceivable to believe that the First Circuit decision in *Allende* would or should change if the meetings were in Brazil, the U.K. or Canada.

alone, and the other being the existence of the product *plus* what it believed to be a distinctive marketing effort—a careful analysis reveals it to be a distinction without substance. What one has, in fact, is precisely the same set of facts, two different legal theories with apparently theoretically significant distinctions, but no distinctions of practical significance. The essence of the court's decisions in *Allende* and the present case is that if the product is physically located in Puerto Rico and Alcan knows it, jurisdiction is proper. There is at least actual consistency in the outcome. However, as *Parry* will demonstrate, the actual consistency in outcome that resulted in the two Alcan cases was really more a result of chance occurrence than an application of a consistent legal principle.

The plaintiff in *Parry* was injured in Utah while he was using a maul manufactured by a Japanese corporation. The maul had been purchased by a friend in Idaho at a local retailer. The situation is similar in this case, where the plaintiffs purchased the product from a local retailer. After his injury, the plaintiff in *Parry* filed an action against the retailer in Idaho. Once again this is similar to the present case. Here, the retailer brought a third-party action against Alcan the foreign manufacturer which the plaintiff joined. In this case, however, the plaintiffs elected to voluntarily drop the retailer and pursue Alcan exclusively.

The marketing arrangements in *Parry* and the Alcan cases, however, were dramatically different. In *Parry*, the product manufacturer's personnel traveled to the United States for meetings to discuss the sale of its products in the United States, as was the case in *Allende*. However, unlike Alcan, the sales were made through an established

marketing network involving distributors covering a large portion of the United States. Distributors reflect a more established and directed marketing effort because they stock inventory and, therefore, have a vested economic incentive to keep the product moving. Often they are formally authorized to use the manufacturer's trademark. In short, the distributor's interests and well being and those of the manufacturer are closely related. The Utah Supreme Court, however, applying post *Asahi* law, held that there was no jurisdiction over the Japanese manufacturer.

Alcan's situation as described in *Allende* was far different. Alcan did no exporting. Rather, a sales representative, basically an independent *individual* (one could hardly imagine a smaller organization) representing a number of different companies, informed potential customers of the products availability for purchase in Brazil. The representative showed the potential customers how they could place the order and arrange to be an importer. The sales representative received a fee or commission for each order so placed. If no one ordered a product through him, he received no commission. If the Alcan products were not of interest to potential customers, the sales representative had numerous lines of other products from other manufacturers upon which to survive. This method is marketing in its most rudimentary form.

Nonetheless, the Utah Supreme Court in *Parry*, perhaps because it really did not understand the marketing involved in *Allende*, incorrectly distinguished *Allende* and held that the product manufacturer and exporter did not take "active" steps to sell its product in Idaho or Utah:

> Nevertheless, Hirota [the manufacturer] and Okada [the exporter] had not taken active steps to sell its product in Utah or Idaho as in *Benitez-Allende*. They were informed of the potential sales in the western United States, but they neither came to Utah nor sent sales representatives to Utah to facilitate the marketing and the purchase of their product.

Parry, supra, 775 P.2d at 666.

The Utah Supreme Court's confusion over the role of sales representatives—as contrasted with distributors—is understandable, but its reference to no meetings in Utah is curious. Early in the opinion, the court clearly stated that the representatives of both companies had come to the United States to discuss the marketing of their products throughout the western United States, and the court appears to attach some significance to the fact that the meeting was not in Utah. For the reasons detailed earlier, it is Alcan's view that a doctrine which focuses on the location of business meetings as a significant element in determining jurisdiction is superficial at best and unrelated to substantive reality at worse.

What is clear from the decisions summarized above is that the present state of the post *Asahi* law in the area of personal jurisdiction is utterly confused, inconsistent and in need of the immediate attention of this Honorable Court. This case presents the Court the opportunity to establish a national standard to assure that Due Process requirements are satisfied and that the law is reasonably predictable.

C. This Court Should Grant Certiorari In This Case Because A Consistent And Predictable Legal Doctrine Is An Essential Feature Of Maintaining The United States' Preeminent Position In Foreign Commerce.

1. Predictable legal consequences are an essential element of stable and vibrant commerce.

It is an axiom of a vibrant economy that there must be predictable legal consequences to a given behavior. That is simply not the present state of affairs in the post *Asahi* law. Moreover, the obvious potential of offending foreign governments by exercising jurisdiction over foreign nationals who exist exclusively within the confines of their own nation but participate in a world market threatens to make the situation much worse. Some courts, for example, have focused on the desire to participate in a world market exclusively as a basis for jurisdiction. Annoyed nations may entertain parallel cases in their own courts and apply their own law resulting in contrary decisions that will add to the confusion.

Further, foreign nations may simply refuse to enforce judgments rendered in the United States. This will diminish the stature of the United States courts in the eyes of the world, and encourage economically pointless litigation in an already clogged court system. Foreign nations may retaliate by exercising similar jurisdiction over United States nationals. Finally, the United States may well find itself more isolated from a world-wide commercial system, since foreign nationals may well be unwilling to accept the inefficiency and burdensome cost created by a confused legal doctrine.

2. Predictable legal consequences in this area requires a comprehensive review of the fundamental doctrines of "minimum contacts" and "stream of commerce" and whether these doctrines are simply outmoded when applied to the contemporary global marketplace.

Although this Court acknowledged in *Asahi, supra*, that the assertion of jurisdiction over an alien defendant needed to be approached with particular caution, it nonetheless undertook to determine the appropriateness of jurisdiction under principles that had not only developed in a purely national context, but also in the context of a marketplace that had not as yet felt the monumental impact of the electronic age. These doctrines had their genesis in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) almost a half a century ago.

At the time of *Asahi*, this Court believed that the potential friction between other nations and the United States over the exercise of jurisdiction over their nationals could be avoided by making a:

> careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by the minimal interests on the part of the plaintiff.

Asahi, supra, 480 U.S. at 115. The state of the law illustrates that these expectations are not realistic for at least two reasons.

First, careful inquiry into the details of a particular marketing structure is time-consuming and costly. This Court has not directly addressed this issue since 1987, and the marketing programs in the present cases are

already antiquated and do not necessarily reflect the present state of the global market. A detailed case-by-case analysis will never establish a predictable doctrine because it will always be obsolete.

The second critical element necessary for success of a case-by-case analysis presumes far greater understanding of global marketing strategies than the courts are likely to possess. The foregoing cases illustrate this fact clearly. The inconsistency in the application of the law is in large part due to the apparent lack of sophistication by the judiciary in a highly complex and sophisticated area in which unrealistic expectations are being imposed on the bench. The result is inconsistent case law in which the direction of marketing strategy is defined from such clearly irrelevant criteria as where meetings are held.[5]

This Court in *Asahi* alluded to another and more dynamic regulator in the international context: the market itself. In examining the pressures on *Asahi* to produce safe products, this Court noted that in addition to subjecting the manufacturer to jurisdiction:

> similar pressures [to produce safe products] will be placed on Asahi by the purchasers of its components in their final products, and sell those products in California, are subject to the application of California tort law.

Id., at 115.

[5] This notion of geographic proximity has become a legal crutch in many areas involving jurisdiction—most notable is the state bar admissions processes where much of the present structure is predicated on the mistaken perception that the location of one's office is necessarily related to the nature of one's practice. Sandy D'Alemberte, President of the American Bar Association, was quoted in the *Miami Herald* on December 16, 1991: "The idea that we shouldn't give advise past state lines is just crazy." D'Alemberte also said, "We Florida lawyers do that all the time. We even give people advice on how to do business in Germany."

Accordingly, Alcan believes, and *Asahi* has in some respects demonstrated, that this case illustrates that limiting jurisdiction does not leave plaintiffs without a remedy, and more importantly, does not create the distortions in economic transactions that subjecting parties to jurisdiction does. The fact of the matter is that notions of safety are not universal and an acceptable product in one culture may not be acceptable in another. Allowing the market to respond to these variations places the cost of the varying degrees of risk tolerance in the proper place, and will more efficiently assign responsibility for appropriate actions within the chain of distribution. Moreover, such considerations could insure that Due Process requirements embodied in the Fourteenth Amendment to the United States Constitutions are satisfied.

CONCLUSION

This Court must fashion a legal doctrine with predictable consequences in the area of *in personam* jurisdiction over non-resident foreign nationals. The present state of disarray and confusion in the law strongly suggests that the legal principles presently in place may be fatally deficient. A comprehensive overhaul is needed. This case presents an excellent opportunity for that review because of the unique interrelationship between comparable cases and because its sister case presents one of the significant appellate opinions on the issue.

For all of the foregoing reasons, Alcan Aluminio do Brasil, S.A., respectfully requests this Honorable Court grant its Petition for a Writ of *Certiorari* to the Supreme Court of Puerto Rico.

Respectfully submitted,

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APPENDIX

RESOLUTION OF THE SUPERIOR COURT OF PUERTO RICO

(Dated November 21, 1986)

Civil No. CS-84-1085

IN THE SUPERIOR COURT
OF PUERTO RICO
UTUADO SECTION

IRIS B. TORRES PAGAN, *et al.*,
Plaintiffs,
v.
ALCAN ALUMINIO DO BRAZIL, S.A.,
et al.,
Defendants.

RE: DAMAGES

RESOLUTION

Co-defendants, Alcan Aluminio Do Brasil, S.A. and Group Brasil, Inc., filed individual Motions to Dismiss, the first contesting the jurisdiction of the Puerto Rico Court, because allegedly there was no minimum contact, and the latter alleging that the complaint failed to state a claim upon which relief may be granted in favor of plaintiffs.

After carefully analyzing the Motions filed, and studied the Law applicable to the controversies before us, we are in a position to resolve them and we proceed to do so.

Rule 4.7 of the Rules of Civil Procedure in effect, sets forth situations in which the General Court of Justice of Puerto Rico may assume jurisdiction over the person of a non-resident.

Thus, the criteria of Rule 4.7(a)(1) as to whether a corporation is doing business within the local forum is a practical commercial and not a technical criterion. *United States v. Scophony Corp.*, 333 U.S. 795.

The United States Supreme Court has stated that it is not necessary that the commercial transactions be performed directly by the defendant himself or through some agent. See *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286. An indirect relationship between the absent defendant and an intermediary is sufficient when the latter is a mere link in the commercial transaction prepared or used by the former to obtain economic benefit from the local forum. This interpretation is similar with the tendency of extending the jurisdiction of the state courts over the non-resident persons in the forum. *Medina v. Tribunal Superior*, 104 D.P.R. 346.

Now then, the due process of law clause of the federal Constitution limits the power of the States and Puerto Rico to enter judgments against non-resident persons. See to these effects, *Kulko v. California Superior Court*, 346 U.S. 84. Should a judgment be entered in violation of said clause, it would not merit complete faith or belief. See, also, *Pennofer v. Neff*, 95 U.S. 714.

The United States Supreme Court has ruled on repeated occasions that the due process of law only requires to submit the defendant a judgment "in

personam", if he is not present in the jurisdiction, that he have certain minimum contracts with it so that the action not seriously interfere with "the traditional elements of fair play and substantial justice". See, *International Shoe Co. v. Washington*, 326 U.S. 310; *World Wide Volkswagen Corp. v. Woodson, supra.* Said doctrine has been adopted by our own Supreme Court in *A.H. Thomas Co. v. Tribunal Superior*, 98 D.P.R. 993, and more recently in *Ind. Siderurgica v. Thyssen*, 114 D.P.R. 548.

In its most recent formulation of the doctrine, the Court states that it serves two related but distinguishable purposes: on one side, to protect the defendant from the burden attributed to litigating in a distant or inconvenient forum; and on the other side, asure that the States (and Puerto Rico), through its courts, will not exceed the limits passed on to them because of their sovereign state. These two considerations must be based on reasonableness and just criteria. That is to say, the relationship between the defendant and the forum should be of such a nature, that it would be reasonable to require the corporation to defend itself in the particular action filed in said forum.

It is necessary to clarify that the laxity with which in recent years the Supreme Court of the United States has faced the diverse jurisdiction problems cannot serve as basis to sustain that at present the territorial boundaries of the States are irrelevant and that, faced with a nationalized economy, these can issue binding and cumpulsory judgments over persons with whom the State has no contact or relationship. And, on the contrary, if the non-resident nor domiciliary defendant has the minimum contacts that the jurisprudence has defined since *International Shoe Co., supra*, then the

judgment that may be issued is binding, and it shall constitute a valid exercise of the State's sovereignty or, in its case Puerto Rico. *Ind. Siderurgica v. Thyssen, supra.*

Certainly, as we have mentioned, even under the doctrine of minimum contact, it is required that the contact within the jurisdiction result in an affirmative act of defendant. Thus, in *A.H. Thomas Co. v. Tribunal Superior, supra,* our highest Forum summarized the three rules that have been elaborated to determine the "in personam" jurisdiction over a non-resident nor domiciliary, to wit:

> "1. The non-resident defendant must do some act of consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. *A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.* (emphasis supplied).
>
> "2. The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact'.
>
> "3. Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of 'fair play' and 'substantial justice'. If this test is fulfilled, there exists a 'substantial minimum contact' between the forum and the defendant. The reasonableness of subjecting the

> defendant to jurisdiction under this rule is frequently tested by standards analogous to those of *forum non conveniens.*"

To determine if the exercise of jurisdiction by a state Court is compatible with the due process of law, the investigation should be directed towards the relationship existing between the defendant, the forum and the litigation. *Helicopteros Nacionales de Colombia, S.A. v. Elizabeth Hall,* 104 S.Ct. 1968; *Shaffer v. Heitner,* 433 U.S. 186.

In *Helicopteros Nacionales de Colombia, S.A. Elizabeth Hall, supra,* however, the Federal Supreme Court stated:

> "The one trip to Houston by petitioner's chief executive officer for the purpose of negotiating the transportation services contract cannot be regarded as a contact of a 'continuous and systematic' nature, and thus cannot support an assertion of general jurisdiction".

As to the application of the doctrine discussed to the case before the Court, it is an uncontroverted fact that co-defendant Alcan Aluminio Do Brasil, S.A., does not have offices, employees or agents in the Commonwealth of Puerto Rico. The only contact or relationship it has with our forum is that, pursuant to the proposed evidence, it exported the "ROCHEDO" brand pressure cookers, object of the present controversy, knowing that a great number of these pots, would be sold in Puerto Rico. Thus, we are not dealing with an isolated or fortuitous business transaction.

A communication sent by said company to Mr. Manuel Diaz, who is alleged to be the president of Group Brazil, Inc., company in charge of the distribution of the merchandise produced by the former, suggests that the

financial activity has been duly calculated to cover the Puerto Rican market. Evidence has been offerd indicating that co-defendant Alcan Aluminio Do Brasil, S.A. was in effect aware that its product held a significant part of the local market. Sales of the pressure cookers in the Puerto Rican market do not appear to be isolated episodes or "the unilateral activity of those who claim some relationship with the non-resident defendant." *Hanson v. Denckla*, 357 U.S. 235. It deals with affirmative acts with an important local repercussion. *World-Wide Volkswagen Corp., supra*, is clear in its points: "The State forum does not exceed its powers pursuant to the due process clause, if it exercises personal jurisdiction over a corporation that allows its products in the stream of commerce with the expectation that the same will be acquired by the consummers of said State" (or Puerto Rico).

Although it has not been clearly established that it was Group Brazil, Inc. that sold and/or distributed the "Rochedo" brand pressure cookers to co-defendant B & B, which is a local corporation, it is quite clear from the evidence presented that it was Mr. Manuel Diaz, supposed president of Group Brazil, who intervened as representative, distributor and/or salesman of said cookers to B & B. What relationship could Mr. Manuel Diaz have with Group Brazil, Inc. at the time he sold and/or distributed the cookers to B & B de Lares?

It appears from co-defendant's, Group Brazil, Inc., own evidence that at least on May 6, 1985 Mr. Diaz was its president. It remains to be established then, the relationship, if any, that Mr. Diaz had on June 6, 1983, date on which B & B places its purchase order for the cookers. Therefore, it would still be in controversy also, what inherence, relationship or involvement Group

Brazil, Inc. had with the sale of the referred cookers. It is important to note that Group Brazil, Inc. was a juridical person and was organized under the laws of the State of Florida since before the date in which Mr. Manuel Diaz sold and/or distributed the pressure cookers to B & B.

After making the foregoing analysis, we are of the opinion that Group Brazil, Inc. as well as Alcan Aluminio Do Brazil, S.A., are directly related with the litigation before the Court. The business transactions made by them are, in our judgment, intimately bound to the case filed by plaintiffs. Therefore, co-defendants having availed themselves to the benefits of doing business in Puerto Rico, it would not contradict the due process of law clause that the General Court of Justice of Puerto Rico exercise jurisdiction over its person, in the present case.

For the foregoing reasons, which are made to form an integral part of this Resolution, the Court DENIES the Motions to Dismiss filed by defendants.

Given in Utuado, Puerto Rico, November 21, 1986.

REGISTER AND NOTIFY.

ANTONIO L. CORRETJER PIQUER
Superior Judge

EN EL TRIBUNAL SUPREMO
DE PUERTO RICO

Num. RE-91-433

IRIS B. TORRES PAGAN, GERTRUDIS ROBLES PEREZ Y ADRIAN ROMAN,
Demandantes-Recurridos,

vs.

ALCAN ALUMINIO DO BRASIL, S.A.,
Demandado-Recurrente.

Revision

RESOLUCION

San Juan, Puerto Rico, a 4 de octubre de 1991.

A la solicitud de revision radicada por la parte demandada recurrente, no ha lugar.

Lo acordo el Tribunal y certifica el senor Secretario General. El Juez Presidente senor Pons Nunez no intervino.

/s/ FRANCISO R. AGRAIT LLADO
Francisco R. Agrait Llado
Secretario General

ESTADO LIBRE ASOCIADO DE PUERTO RICO
TRIBUNAL GENERAL DE JUSTICIA
TRIBUNAL SUPREMO

01 DE 01

CASO: Re-91-0433
CASO ORI.: CS84-1084 Y
DANOS Y PERJUICIOS
ACCION CIVIL O DELITO

TORRES PAGA, IRIS B.
Recurrido,

vs.

ALCAN ALUMINIO DO BRASIL, S.A.
VS. OTROS,
Recurrente.

ROMERO DE JUAN EUGENIO C
PO BOX 70364
SAN JUAN, PR

000000936

NOTIFICACION

CERTIFICO QUE EN RELACION CON EL (LA) SOLICITUD DE REVISION
EL TRIBUNAL DICTO EL (LA) MANDATO
QUE SE ACOMPANA :

******NOTA PARA ABOGADOS Y PARTES******
MANDATO ENVIADO A SALA DE INSTANCIA, ESTA CARTA ES SOLAMENTE PARA SU CONOCIMIENTO.

VELEZ CARDONA VICTOR A-CALLE ARANO #3-LARES, P.R.-00669 SR. SECRETARIO GENERAL-TRIBUNAL SUPERIOR-UTUADO, PUERTO RICO-00641

SAN JUAN, PUERTO RICO A 23 DE OCTUBRE De 1991

/s/ FRANCISCO R. AGRAIT LLADO
Secretario General

/s/ (ILLEGIBLE)
Secretario Auxiliar

JUDGMENT OF THE SUPERIOR COURT OF PUERTO RICO

(June 28, 1991)

[TRANSLATION]

Civil No.: CS-84-1084
CS-84-1085

GERTRUDIS ROBLES PEREZ, *et al.*,
Plaintiffs,

vs.

ALCAN ALUMINIO DO BRASIL, *et al.*,
Defendants.

Re: DAMAGES

JUDGMENT

On August 16, 1990 the trial in the herein consolidated actions was held and plaintiffs Gertrudis Robles and her husband Adrian Roman, as well as Iris B. Torres had the opportunity of presenting their testimony regarding the events which allegedly gave rise to the damages claim. On its behalf, the defendant, Alcan Aluminio Do Brasil, S.A. ("Alcan"), presented the expert testimony of Eng. Simon Carlo an expert in the areas of pressurized vessels.

The complaint in these cases were simultaneously filed, and in synthesis allege, that the plaintiffs Gertrudis Robles Perez and Iris B. Torres Pagan suffered burns as a result of an "explosion," of the Rochedo pressure cooker, alleging that the said vessels

do not close properly and/or are defectively built. Both complaints are practically identical except for the damages claimed and therefore the consolidation of the claims was ordered.

Defendant Alcan denied the essential allegations of the complaint and affirmatively alleged that the Rochedo cookers do not suffer from any design or manufacture defect which may be the proximate cause of the alleged damages, that the referred cookers did not explode, that the damages claimed are the results of plaintiffs' own negligent use and/or maintenance and, lastly, that the Court lacks jurisdiction over the person of Alcan Aluminio Do Brasil, S.A., a foreign corporation organized under the laws of the Republic of Brazil with office in Sao Paolo, Brazil. This allegation was resolved through resolution dated November 21st, 1986.

Before the commencement of trial the parties reached various stipulations through which the claims of the minor children of Gertrudis Robles Perez and Adrian Roman Pagan, Myrna Raquel, Adrian y Magdalena, all Roman Robles, were dismissed. Plaintiff Iris B. Torres Pagan withdrew the claims of her minor children Juan R. Rodriguez Torres and Lizbeth Rodriguez Torres, as well as of her ex-husband Juan A. Rodriguez and the prior conjugal partnership between them. Additionally, the plaintiffs dismissed with prejudice their claim against B & B and its insurance companies and confirmed said stipulation for the record with the Court's approval. B & B de Lares on the other hand dismissed its third party complaint against Alcan with prejudice.

After hearing the testimony of the parties, as well as examining the documentary evidence, the expert testimony and the arguments of the legal representations, the Court enters judgment based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

Gertrudis Robles Perez and Adrian Roman Pagan, Civil No. CS-84-1084

The testimony of Gertrudis Robles Perez consisted of narrating how on April 7, 1984, while cooking some chickpeas in the Rochedo pressure cooker, the cooker "exploded" violently and tossed its contents upwards reaching the right side of her face. She testified having received medical attention on that same day at the Arecibo Regional Hospital. There they applied a bandage to her eyes for two days and continued going to the hospital during the term of approximately one week to receive treatment consisting of application of ointments.

From Mrs. Robles Perez's testimony, it appears that plaintiff had many years of experience using pressure cookers (approximately 12); the cooker in controversy having been purchased during the month of November 1982.

Mrs. Robles Perez testified that on the day of the alleged accident she had cleaned the cooker for using it as usual, put the chickpeas and water up to the level indicated in the interior of the cooker and made sure that the cover was duly closed.

According to Mrs. Robles Perez, after the cooker reached its boiling level, she lowered the temperature to medium and checked the cooker with the rice that was to right of the burner where the pressure cooker with the

chickpeas was. She testified that the cooker was operati. g as usual letting out steam through its principal valve and making the characteristic noise the cooker makes when it is operating normally. That she did not notice anything abnormal regarding the function of the cooker and that two or three minutes after she had lowered the temperature to medium the cooker "exploded" violently, tossing the cover upwards and tossing it to the carport which was next to the kitchen. Mrs. Gertrudis described the explosion as something terrible, stronger than the noise made by a firecracker and with such violence that it destroyed the left side of the gas stove on which it was set, which damages she estimated in $500.00. Mrs. Gertrudis testified that at that time the chickpeas and the water spilled on her causing burns to the right side of her face and affecting her vision.

The Court takes judicial notice of the fact that on the day of the trial there were no visible burn scars on Mrs. Gertrudis's face.

Mrs. Gertrudis's husband, Mr. Adrian Roman, testified that at the moment of the alleged accident he was in the patio of the residence from where he heard an "explosion," he got nervous when he heard his children tell him "daddy the pot killed mommy" and when he got to the kitchen he found his wife Mrs. Gertrudis rubbing her face and immediately took her to the Lares Hospital and later to the Arecibo Regional Hospital. Mr. Roman alleged that as a result of this accident he had to incur in expenses of a little over $500.00 to replace the stove.

He also stated that the weight that goes on top of the principal valve, as well as the rubber gasket under the cover, disintegrated with the explosion and that one of his daughters through it out when they cleaned the kitchen immediately after the explosion.

Iris B. Torres Pagan, Civil No. CS-84-1085

Plaintiff Iris B. Torres Pagan testified that on February 15, 1984 she had cooked some chicken gizzards in the Rochedo pressure cooker and when she was going to put the cooker in the sink and opened the faucet the cooker "exploded" hurling the cover upwards making the water jump on her and burn some parts of her upper thorax and the upper part of her arm which scars were observed by the Court since they are still there. That as a result of said accident she was hospitalized during three or four days during which time compresses were applied and therapy given. She also testified that she was under treatment for approximately some two months.

Mrs. Torres testified that she learned to use the pressure cooker since she got married in 1978 and that she had the Rochedo cooker since May 1982. In addition, she testified that she had never had problems with pressure cookers and that she always followed the procedures in the instructions, always making sure that the cooker was clean and checked the valve before using the cooker to cook.

Mrs. Torres particularized that on the date of the accident she put water in the cooker and added the chicken gizzards up to the level indicated in the interior of the cooker and then made sure that the cover was properly closed. She placed it on the burner on medium temperature and left the kitchen to tend some clothes she was washing. That approximately some fifteen or twenty minutes later she returned to the kitchen and saw the cooker operating normally and letting out steam through its principal valve. At that moment she transferred the cooker towards the sink and without trying to open it, she opened the sink faucet at which time the cooker "exploded" violently.

Mrs. Torres explained that all the medical expenses were covered by the Colegio San Jose medical plan where she worked on the date of the accident except for the $50.00 hospital deductible plus medicines.

In addition, she indicated that the weight which goes on top of the principal valve as well as the rubber gasket around the interior of the cover disintegrated with the explosion.

General considerations as to both plaintiffs

Plaintiffs herein did not present any medical evidence as to the nature and extent of the damages suffered. Plaintiffs unsuccessfully attempted to introduce into evidence photocopies of unauthenticated medical records which this Court, at the request of defendant, did not admit into evidence. On the other hand, plaintiffs did not present any expert testimony to establish the existence of a defect in the referred pressure cooker.

Neither did the plaintiffs introduce into evidence any proof in connection with the jurisdiction of this Court over the person of the defendant Alcan Aluminio Do Brasil, S.A., that would establish that said defendant was doing business in Puerto Rico or in any other way be subject to the jurisdiction of this Court. On the basis of said elements, defendant's legal representation presented a nonsuit motion at the completion of plaintiffs' case setting forth orally the legal arguments on which this Court should dismiss the claims against defendant. Plaintiffs' legal representation submitted said request and the Court, after reviewing the point raised by both parties, stated that it would reserve its decision over the nonsuit motion made by defendant Alcan.

Alcan Alumino Do Brasil, S.A.—Testimony of Eng. Simon Carlo

In its defense, defendant, Alcan, limited itself in presenting the testimony of Eng. Simon Carlo, an expert highly qualified to testify as to the operation and behavior of pressurized recipients like the Rochedo cookers object of the present controversy.

Eng. Carlo testified that on August 22, 1988 he had had the opportunity of carefully examining Mrs. Gertrudis Robles Perez and Mrs. Iris B. Torres Pagan's pressure cookers at the office of Attorney Victor Velez Cardona, plaintiffs' attorney.

Eng. Carlo expressed that, in his professional judgment, the cookers object of this litigation had not exploded. Eng. Carlo explained that the physical condition of the cookers did not show the presence of any deformity, an indispensable element in a traumatic explosion event as the one described by the plaintiffs. Should it had been an explosion as the one described by plaintiffs, Eng. Carlo informed us, there would have resulted various deformities on the cover, as well as in the outside of the cooker, as well as other deformities which would be easily observed in the security edges that these cookers have to insert one over the other throughout the circumference that joins the cover with the inside of the cooker. Eng. Carlo also indicated that there was also no sign that the temperature inside the cooker had reached the necessary levels to cause a traumatic explosion, since the temperature fuses of both cookers were intact. On the other hand, Eng. Carlo explained that plaintiffs' testimony to the effect that the principal pressure valve was working normally letting out vapor and behaving in its usual manner, confirmed the impossibility of an explosion, since said

circumstances is demonstrative that any excess pressure was coming out of the cooker in the form and manner in which said devices are supposed to operate in the majority of the cases.

Eng. Carlo pointed out in his testimony that the effect of pouring running water over the hot pressure cooker is to cool it off, which immediate result is to reduce the internal pressure of the vessel, and therefore in the case of Mrs. Torres said event is incompatible with the explosion of the vessel when the water comes in contact with the cover.

Eng. Carlo testified that the examination of the cookers did not reveal the presence of any manufacturing and/or design defect and, thus, concludes that the accidents described in these cases are not attributable to an explosion nor to any defect of the cookers. Eng. Carlo reiterated that plaintiffs' descriptions of the operation of the cookers is indicative that they were operating correctly and not of circumstances that would have reflected an abnormal operation which would explain the events described by plaintiffs nor the results of the alleged burns.

Eng. Carlo ended his testimony explaining that, in his opinion, the pressure cookers he examined and on which he testified in the Court were at present in operational condition and could be used to cook after installation of the corresponding rubber cookers. Nevertheless, while Eng. Carlo was examining the cookers in Attorney Velez Cardona's office he was provided a stove and told by Velez Cardona that he would buy the rubber gasket as well as the weight so that Eng. Carlo would put the cookers to work. Eng. Carlo refused to make such test, which in this Court's opinion would have been a determining factor in evaluating the credibility of his testimony.

CONCLUSIONS OF LAW

Jurisdictional Testimony

On January 17, 1986 defendant Alcan, filed a motion to dismiss addressed to the third party complaint filed by B & B de Lares since said defendant was the only one to serve process on Alcan. Alcan argued that the Court lacked jurisdiction over the person of said foreign corporation since it was not doing business in Puerto Rico and there was no minimal contact with this jurisdiction. On February 11, 1986 Alcan submitted a sworn statement of Mr. Sergio Ruis Cavalganti confirming the fact that said Brazilian corporation did not have an agent, offices or representatives in Puerto Rico, that it did not own any real estate or personal property in this jurisdiction; nor did it have bank accounts, telephone, warehouses or any other investments in Puerto Rico, nor had it requested business nor carried business transactions with Puerto Rico at any time pertinent to the present claim.

On November 19, 1985 and December 5, 1985 the then codefendant B & B de Lares presented its arguments in opposition to the motion to dismiss presented by Alcan. The evidence presented by B & B de Lares was preliminary in nature not admissible and aimed at establishing that Group Brazil, Inc. (defendant against who B & B de Lares desisted voluntarily and with prejudice) was doing businesss in Puerto Rico. This issue was resolved through resolution dated November 21, 1986. (Copy of the resolution issued is attached).

Controversy as to absolute liability

The case of *Mendoza v. Cerveceria Corona, Inc.*, 97 D.P.R. 499 (1969), extended the absolute liability of a manufacturer, founded on the concept of implicit guarantee, to any user or consumer of a product without the necessity of his acquiring it from the manufacturer, that is, without requiring any contractual ties between the parties.

In said case, plaintiff bought two boxes of Malta Corona business. He drank a Malta and when he finished he noticed a bad taste and sediment in the bottom of the bottle, he became nauseous, vomited, had diarrhea and discomfort, all of which required his hospitalization for two days.

The lower Court determined that the doctrine of implied guarantee was not applicable and dismissed the complaint because the negligence of the defendant was not proven.

In overturning this decision, the Supreme Court points out that in this jurisdiction, in other words, in Puerto Rico, a maker or a manufacturer that places a product in the market has an absolute liability to answer for damages that the product causes to the consumer of the product, which exempts the latter from directly establishing the negligence by the manufacturer as long as the damages are attributable to a defect of the product.

Since the case of *Mendoza v. Cerveceria Corona*, 97 D.P.R. 499 (1969), the manufacturer's absolute liability towards the consumer has been adopted in this jurisdiction.

"The purpose of said liability is to make sure that the cost of the damages resulting from a defective product are borne by the manufacturers who sent such products to the market instead of the persons so damaged who are powerless to protect themselves."

However, our Supreme Court explained:

"That since the consumer does not have to directly establish the manufacturer's negligence, the manufacturer is not an insurer of all the damages that its products may cause . . . if the damage is not attributed to a defect of the product, there is no basis to apply the norm of absolute liability." (Citation omitted).

In said case, the following definition for defect is cited with approval:

". . . A defective product may be defined as that which failed to equal the average quality of similar products, and the manufacturer is then liable for the damages resulting from the deviation of the norm." (See footnote 7 of the opinion, page 512).

In the case of *Apolinar Montero Saldana v. American Motors Corp.*, 107 D.P.R. 452 (1978), our Supreme Court expressed that "the defect from which the product suffers in order to apply the absolute liability norm does not have to be one unreasonably dangerous to the consumer or buyer" as said defect is defined in Section 402(A) (1975) of the Restatement of Torts. The Supreme Court reiterates the applicability in Puerto Rico of the definition adopted in *Mendoza v. Cerceveria Corona, supra*, which is suggested by Judge Trainer in his article the Ways and Means of Defective Products and Strict Liability, 3210 Tenn. L. Rev. 367 (1965).

". . . a defective product may be defined as that which fails to equal the average quality of similar products and the manufacturer is then liable for the damages resulting from the deviations of the norm."

The Supreme Court explained that the defect that brings about the application of the absolute liability doctrine includes the defect in manufacturing, as well as in design. "*A defect may come about from the mind of the designer as well as at the hand of the laborer.*"

In Puerto Rico absolute or no fault liability is defined as all those who through their activities create the risk of harming another, should always be liable for that harm, if produced through no personal fault of any kind, therefore, the manufacturer is responsible for the damages that originate as a result of the defects in design or manufacturer of its products that may constitute deviation of the norm. See in this regard *Jimenez v. Pelegrina Espinet*, 112 D.P.R. 700 (1982) or *Gierbolini v. Employers Fire Insurance Co.*, 104 D.P.R. 853 (1976). This doctrine constitutes an exception to the rules of the basic causal relations, fault-harm-liability created in *Rivera v. Caribbean Home Construction, Inc.*, 100 D.P.R. 104 (1971), see also in this respect as to design or manufacture *Montero Saldana v. American Motors Corp., supra.*

In the case before us, in our judgment we must cite, with approval the article of Walters, *Products Liability and Problem of Proof*, at page 1783 and hazardous, *Science and the Product Liability Claims*, at 54 of 1968, ABAJ, page 981 *et seq.*, and in particular page 986 where both authors state as follows:

> "The subject of civil liability of the manufacturer for defect of the construction project is a special interest in the North American jurisprudence. Precisely, one of the reasons of the insufficiency of the negligence to guard the victim was that relative to this type of defects. According to the criteria of negligence, the harmed had to prove that the

manufacturer knew that the product was not reasonably safe for the use to which it was destined, or at least, these circumstances should be proven.

This proof—or this evidence—referred to the project-phase dressed a notable difficulty the user or the consumer did not have the precise technical knowledge to individualize the defect. Frequently, it was not even possible to request an expert's opinion because only the manufacturing company's experts were in a position to issue an opinion based on the existence or inexistence of a planning deficiency in the production."

In the case before, we must concur with this article in the sense that the letter sent by Alcan Aluminio Do Brasil to the newspaper, it is notified that the cookers manufactured by Alcan between the years 1977 and 1982 are being recalled because these units, and we repeat what the letter says had a defective packaging that allows that the cookers may be opened by the users while it still had pressure and this could cause damages or an accident to the person who uses them. Therefore, we cannot agree with defendant's expert in the sense that the cookers were operational and have no problems when the company itself is or attempted to recall the cookers because of a manufacturing or building defect and he refused to put them to work.

Bear in mind, on the other hand, that it is necessary to point out that there are products that may, in addition, be categorized as defective when these are placed in commerce with the pertinent instructions regarding its use so long as these be not presumed known by the user.

In the case before us, Mr. Gertrudis Robles atated that inside the cooker she saw something, but that it was not the book shown by defendant's attorney, which was the instruction book.

The North American jurisprudence has stated that any product that creates a ultrahazardous condition is considered defective, see in this respect, *Friedman Defects in Products*, page 273.

To conclude, we should summarize that expressed with respect to this type of absolute harm in Puerto Rico that the following argument from the manual of Professor Diego Espin Canova, civil law professor in his manual 3 at page 459, following Article 1902 of the Spanish Civil Code (1802 of our Civil Code), where it says the unlawfulness of the behavior of the manufacturer rises from the violation of the diligent manufacturing duty.

Last idea to be considered in the fortuitous case

Defendant has wanted to bring to the Court's attention that if an accident did happen and that it was caused by the cookers, this was due to an act of God to a fortuitous case or to something other than the production manufacturing or planning process of the product at the Alcan Aluminio Do Brasil plant.

The manufacturing defect having been proved or assumed and that it is the effective and principal cause of the harm, it is in order to attribute harmful result in the manufacturing process to the owner. The presumption of fault—or the guilty act—allows to attribute the concrete harmful result to a violation on the part of the manufacturer of the duty of diligent

manufacture. In addition, with the counter proof of the safety of the products, can only free himself from all or part of the obligation to repair the harm with the showing that the defect was due to a fortuitous case. Two notions weaken the idea of fortuitous case: foreseeabilty and inevitability. Paraphrasing Article 1058 of the Civil Code, we can say that the manufacturer does not answer for those damages it could not have foreseen, or that foreseen, where inevitable and that the liability of the manufacturer does not derive from the effective manufacture of a product but for the introduction in the market of a product defectively manufactured. Which means that the manufacturer is liable insofar as it had violated the duty of control over products manufactured, that as concrete declaration of the most ample diligent manufacturing duty falls upon the owner of the industrial enterprise.

According to what is perceived in Article 1057 of our Civil Code, the manufacturer must show that it had acted with the required diligence for the conditions of the enterprise and the temporary and special circumstances of its business activities. The maximum limit of required diligence arises from the conservation of the enterprise. Nevertheless, conservation of the enterprise is not the same thing as conservation of the business benefit. The enterprise, in order to comply with the level of diligence that is socially required, should on occasions carry out reforms in its installations, reestablish a production control system, phase—in general—extraordinary expenses which may give rise to a difficult financial situation and prevent the withdrawal of annual benefits during a series of continued exercise. The principal of conserving the enterprise does not prevent it from having to work with losses. The maximum level of

diligence would be understood completed when that situation worsens, threatening the economical ruin of the enterprise.

You can say that a product has been improperly used when it is used or consumed in a different manner than objectively foreseen. The criteria of the use objectively foreseen constitutes the limits of the manufacturer's diligence. Normal use is equal to objectively foreseen use. The product, pursuant to the formula of the North American jurisprudence--must be reasonably safe for its use. Note that there are objectively foreseeable uses that, nonetheless, cannot be said to be normal. The normality or abnormality of use should not be understood in its material sense. From damages resulting from abnormal use, but foreseeable pursuant to the rules of common experience, the manufacturer must answer.

Therefore, none of the exemptions where Alcan Aluminio Do Brasil may be placed in this case exempt it from liability, since the fortuitous case and the force majeure does not free it from the liability which in this case is imputable and it must answer for the damages suffered by the plaintiffs as ordered to do so herein.

JUDGMENT

In view of the foregoing findings of fact and conclusions of law, judgment is entered granting the complaint and orders the defendant to pay damages to plaintiffs Gertrudis Robles Perez, her husband Adrian Roman and Mrs. Iris B. Torres Pagan, as follows:

A. Damages for mental anguish and suffering to Mrs. Gertrudis Robles in the amount of $3,000.00, to Mr. Adrian Roman the amount of $1,000.00, for the damages

caused to the stove the amount of $500.00 and to Mrs. Iris B. Torres the amount of $5,000.00.

B. Permanent damages evident to the Court and that the Court could perceive such as the burn scars on Mrs. Gertrudis in the amount of $3,000.00 and Mrs. Iris B. Torres in the amount of $7,000.000 and the amount of $3,000.00 for expenses and attorney's fees, plus costs.

In Utuado, Puerto Rico, June 28, 1991.

REGISTER AND NOTIFY.

(Signed)
DIMAS G. PADILLA BRUNO
Judge

[TRANSLATION]

Civil No.: CS-84-1084
CS-84-1085

IN THE SUPERIOR COURT
OF PUERTO RICO
UTUADO SECTION

B & B DE LARES,
Plaintiff,

vs.

GROUP BRAZIL, INC.,
Defendant.

Re: DAMAGES

PARTIAL JUDGMENT

Plaintiff having filed a motion to dismiss pursuant to Rule 39.1(a) of the Rules of Civil Procedure in effect dismissal under its own right—the Clerk of this Court will enter judgment by dismissal without prejudice and without attorney's fees as to Group Brazil, Inc.

REGISTER AND NOTIFY.

Given in Utuado, Puerto Rico, April 6, 1988.

(Signed)
OSCAR DAVILLA SULIVERES
Judge

REQUEST FOR REVIEW IN THE SUPREME COURT OF PUERTO RICO

(August 12, 1991)

[TRANSLATION]

No. _____

IN THE SUPREME COURT
OF PUERTO RICO

IRIS B. TORRES, PAGAN,
Plaintiff-Appellee,

v.

ALCAN ALUMINIO DO BRASIL, S.A.,
Third Party Defendant-Appellant.

GERTRUDIS ROBLES PEREZ
and ADRIAN ROMAN,
Plaintiffs-Appellees,

v.

ALCAN ALUMINIO DO BRASIL, S.A.,
Third Party Defendant-Appellant.

REVIEW

REQUEST FOR REVIEW

TO THE HONORABLE SUPREME COURT:

COMES NOW third party defendant-appellant, Alcan Aluminio Do Brasil, S.A. ("Alcan"), represented by its undersigned attorneys and respectfully alleges and prays:

I. JURISDICTION OF THE SUPREME COURT

The present request to grant a review is made pursuant to Section 14 of the Judicial Act of Puerto Rico of 1952, 4 L.P.R.A., §37(b), Rule 53 of the Rules of Civil Procedure of 1979 and Rule 17 of the Rules of the Supreme Court of Puerto Rico.

II. JUDGMENT APPEALED

Appellant request the review of the judgment entered by the Honorable Dimas Padilla Bruno, Judge of the Superior Court, Utuado Section, on June 28, 1991, copy of which notification of judgment was filed on July 11, 1991. In such judgment the Superior Court granted the complaint in the consolidated civil actions CS-84-1084 and CS-84-1085 and entered judgment against Alcan to pay the aggregate sums of $19,500.00 in damages plus $3,000.00 for expenses and attorneys fees. Said judgment involves an improper and unconstitutional exercise of jurisdiction over the person of Alcan and is unfounded and/or contrary to the admissible evidence presented in the case, and, hence, it is imperative that this Honorable Supreme Court issue the present request for review and in due course revoke the judgment in controversy herein.

III. BREACH STATEMENT OF FACTS

The complaints in these actions were filed before the Superior Court, Utuado Section, on or about August 4, 1984. (*Exhibits 1 and 2*). Summons were issued against the defendants that appeared in the caption at that time B&B de Lares, Inc., the corporation that sold at retail the "Rochedo" brand cookers doing business in Lares, Puerto Rico; Group Brazil, Inc., corporation with

principal offices in Miami, Florida, and Alcan Aluminio Do Brasil, S.A., manufacturer of the "Rochedo" brand pressure cookers with principal offices in Sao Paulo, Brazil. (*Exhibits 3, 4 and 5*). Plaintiffs never served process upon Group Brazil nor Alcan. Defendant B&B de Lares presented a "crossclaim" against appellant Alcan y Group Brazil, on November 8, 1984, serving process through edict on June 26, 1985. (*Exhibits 6 and 7*). On October 3, 1985, Alcan filed its answer to "crossclaim" which in reality was a third party complaint. (*Exhibit 8*).

The complaints in both cases presented identical allegation and indicated that the plaintiffs Gertrudis Robles Perez and Iris B. Torres Pagan suffered burns as a result of the "explosion" of a "Rochedo" brand pressure cooker. The plaintiffs alleged as the proximate cause of the "explosion" that said cookers allegedly "do not close properly and/or are badly built". Alcan denied the essential allegations of the complaint and affirmatively alleged that said "Rochedo" cookers do not suffer from design or manufacturing defects that may be the proximate cause of the alleged damages, as said cookers did not explode, that the alleged damages are the result of plaintiffs own negligent use and maintenance and, lastly, that the court lacked jurisdiction over the person of Alcan since said corporation was never duly served with process and/or said foreign corporation does not do business in Puerto Rico.

The jurisdictional issues as to the person of Alcan were elaborated on thereafter through motions to dismiss, the first one dated January 17, 1986 addressed to the "crossclaim" and the second, dated February 9, 1987, addressed to dismiss the original complaint. (*Exhibits 9 and 10*). On November 21, 1986 the court

denied the motion to dismiss the ' crossclaim." (*Exhibit 11*). Nevertheless, the court never entertained the motion to dismiss the original complaint. On February 13, 1987, the plaintiff opposed the motion to dismiss the original complaint. (*Exhibit 12*). Said arguments were once again submitted, with the approval of plaintiffs on the date of trial, but not before, by stipulation of the parties and the courts approval, plaintiffs voluntarily dismissed with prejudice its claim against B&B de Lares and the latter at the same time did the same as to the third party complaint against Alcan. (*Exhibit 13*, at page 2).

On August 16, 1990 trial was held in the cases. As to the nature and scope of the evidence we will limit ourselves to pointing out that plaintiffs presented no proof regarding defect, causality, nor any element relative to the jurisdiction of the court over the person of Alcan. Third party defendant Alcan limited itself to presenting the testimony of Eng. Simon Carlo, expert who explained the physical impossibility that the referred parts could have "exploded". On June 28, 1991 the Superior Court issued judgment in the case in favor of plaintiffs for the aggregate sum of $22,500.00 notification of which was filed on July 11, 1990. (*Exhibit 13*).

IV. CONTROVERSIES OF LAW

A. The Court Erred in Exercising Jurisdiction Over the Person of Alcan When Said Third Party Defendant was Never Served with Process by Plaintiffs.

B. The Court Erred in Exercising Jurisdiction Over the Person of Alcan it Being a Foreign Corporation and Without Any Evidence that Said Corporation was Doing Business in Puerto Rico.

C. The Court Erred in Concluding that the Testimony of Eng. Simon Carlo Did Not Merit Credibility.

D. The Court Erred in Finding for the Plaintiffs in Spite of There Not Being Any Admissible Evidence Regarding Defects in the Cookers and There Being No Causal Relationship Between Any Defect in the Cookers and the Alleged Damages Suffered.

E. The Court Erred in Granting Special and Permanent Damages in Favor of Gertrudis Robles and to Sentence the Defendant to Pay Expenses and Attorneys Fees.

V. DISCUSSION OF THE CONTROVERSIES RAISED

A. The Court Erred in Exercising Jurisdiction Over the Person of Alcan When Said Third Party Defendant was Never Served with Process by Plaintiffs.

The original complaints named as defendants Group Brazil, B&B de Lares and the appearing party Alcan. (*Exhibits 1 and 2*). However, the only defendant served with process by plaintiffs was B&B de Lares. (*Exhibit 3*).

On October 2, 1984 the defendant B&B de Lares filed what it entitled "counterclaim" against Alcan and Group Brazil. (*Exhibit 6*). Said "counterclaim" is in effect a third party complaint, since on that date neither Alcan nor Group Brazil had been served with process by plaintiffs. The third party complaint was filed by B&B de Lares with the only and express purpose of having the third party defendants, Group Brazil and Alcan compensate B&B de Lares should a judgment be issued

against it in the principal litigation.[1] On November 21, 1986 the court denied Alcan's Motion to Dismiss as to the "counterclaim". (*Exhibit 11*).

On February 9, 1987 Alcan filed a Motion to Dismiss the original complaint arguing the lack of jurisdiction over its person and among other grounds setting forth the lack of service of process by plaintiff. (*Exhibit 10*). The opposition of just two paragraphs filed by plaintiff was limited to admit that the summons addressed to "third party defendants" Alcan and Group Brazil had never been served "in spite of the attempts to do so." However, plaintiffs could not enumerate the attempts supposedly made to accomplish said service of process. Likewise, plaintiffs never set forth their reason, if any, for not having served process within the term provided by Rule 4.3(b) or having requested extension of time within said term.

On March 14, 1988 status conference was held in the case as can be seen from the minutes of March 31st, 1988, the court had not decided the Motion to Dismiss the original complaint filed by Alcan. (*Exhibit 14*). In the pretrial report, Alcan reiterated its allegations of absence of jurisdiction over the person for lack of service of process. (*Exhibit 15*).

The day of trial the plaintiffs *withdrew with prejudice* its complaint against B&B de Lares while the third party plaintiff, B&B de Lares, *withdrew with prejudice* its complaint against Alcan. (*Exhibit 13*, p. 2). Plaintiff at no time requested nor procured a stipulation or determination as to the presence of Alcan in the suit,

[1] Group Brazil was later removed from the litigation when at the request of the third party plaintiff B&B de Lares the court issued partial judgment for voluntary dismissal without prejudice on April 6, 1988. (*Exhibit 13A*).

who reiterated at all times the lack of jurisdiction herein presented. *Viuda de Rivera v. Pueblo Supermarkets*, 102 D.P.R. 134 (1974). From the beginning of the suit plaintiff had knowledge that Alcan was a foreign corporation who should be served with process through publication since it did not have an office or resident agent in Puerto Rico. However, plaintiffs never attempted to prosecute the claim directly against the third party defendant, Alcan.

The summons is the inaugural step of the due process law that allows the exercise of jurisdiction by the court to adjudicate the rights of the defendant and its requirements are of strict compliance. Therefore, any summons effected respect to Alcan by the defendant and third party plaintiff B&B de Lares was insufficient for the court to acquire jurisdiction over the person of the herein appearing party with respect to the original complaint. *Rodriguez v. Nazrallah*, 118 D.P.R. 93 (1986). We hold, therefore, that the Superior Court erred in its decision to exercise jurisdiction over the third party defendant which complaints had been dismissed with prejudice by the third party plaintiff itself, and which party was never served with process by plaintiff. Under such circumstances, the principal action does not survive.

In *A.A.A. v. Builders Ins. Co.*,[2] the Supreme Court faced the determination of the circumstances by which a third party complaint survives. It is clear that under the supposition that "A" sues "B" and in turn sues "C" for it to reimburse "B" whatever amount he would have to pay "A", *the third party complaint does not survive if "A" files for voluntary dismissal with prejudice and*

[2] 115 D.P.R. 57 (1981).

freely withdraws its action against "B". In the present action the plaintiffs withdrew voluntarily and with prejudice against the only defendant served B&B de Lares, who at the same time voluntarily withdrew third party action against Alcan. It is patently clear that before these circumstances B&B de Lares was liable for absolutely nothing to the plaintiffs and, therefore, its action against Alcan for compensation becomes academic. Faced with such circumstances, court was obliged to rule that it was impossible to continue with the case against the third party defendant, Alcan, who had never been served by plaintiffs.

B. The Court Erred in Exercising Jurisdiction Over the Person of Alcan it Being a Foreign Corporation and Without Any Evidence that Said Corporation Was Doing Business in Puerto Rico.

The findings of fact and conclusions of law that the court set forth in its judgment relative to appellant Alcan lead to the inevitable conclusion that there was never a basis to exercise jurisdiction over the person of Alcan and that the judgment entered against it is without merit in law. To such effects the court recognizes that:

> "Neither did plaintiffs introduce into evidence any proof relative to this court's jurisdiction over the person of the defendant Alcan Aluminio Do Brasil, S.A., that would establish that said defendant was doing business in Puerto Rico or that in any other manner be subject to the jurisdiction of this court . . ." (*Exhibit 13*, at pp. 7-6).

Immediately following, the Superior Court makes reference to the Resolution of November 21, 1986 entered by the Honorable Antonio L. Corretjer Piquer, Judge. (*Exhibit 11*). In said resolution, the court expressed that:

> "As to the applicability of the disputed doctrine [regarding *'in personam'* jurisdiction] to the case before the court, it is and *uncontroverted* fact that defendant Alcan Aluminio Do Brasil, S.A., *has no offices, employees, or agents in the Commonwealth of Puerto Rico.* The only contact or relationship it has without forum is that, according to the *proposed proof,* it exported the 'Rochedo' brand pressure cookers, object of the present controversy knowing that a great amount of these cookers, would be sold in Puerto Rico. Hence, it is not a matter of an isolated or fortutious act of business." (*Exhibit 12,* p. 5). (Emphasis supplied).

However, as to the proof presented by the then defendant B&B de Lares in its motions of November 19, and December 5, 1985, in opposition to the Motion to Dismiss filed by Alcan (*Exhibits 16 and 17*), the trial Judge explains that:

> "It was *preliminary* in nature *inadmissible, and aimed at establishing that Group Brazil, Inc.* (defendant against whom B&B de Lares itself assisted voluntarily and with prejudice) was doing business in Puerto Rico." (*Exhibit 13,* p. 10). (Emphasis supplied).

In neither the judgment of June 28, 1991 nor the Resolution of November 21, 1986 is it established that Alcan had the minimum contacts necessary for the court to exercise jurisdiction over its person within the constitutional framework of due process of law. This controversy was renewed during the trial with the consent of plaintiffs and, once again, was on record to be adjudged in its merits.

However, the court entered judgment against Alcan. In so doing, the court not only acted in obvious contradiction to its own conclusions as to the lack of Alcan's minimum contacts with this forum, but also

contravened traditional notions of fair treatment and equal justice outlined by this Honorable Court and by the Supreme Court of the United States. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1983); *Asahi Metal Industry Co. Ltd. v. Superior Court of California*, 480 U.S. 102 (1987); *Industrial Sidedurgica v. Thyssen Steel Caribbean*, 114 D.P.R. 548 (1983); *Molina v. Supermercado Amigo, Inc.*, 119 D.P.R. 330 (1987).

In the case of *Asahi Metals, supra*, the Federal Supreme Court faced the constitutional considerations due process as to the exercise of jurisdiction over the person of a foreign corporation whose products were sold in the United States. In concluding that the Supreme Court of California had violated the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, the majority reasoned that to compel defendants to resolve a contribution action between the agent importer of the product and the manufacturer, even when said articles entered into commerce in the United States with the knowledge of both, would result in an unreasonable and unjust violation of the due process of law. The majority in its celebrated opinion went on to explain that to said effects it is necessary to consider: (1) the hardship it represents to be forced to resolve a dispute in a distance and forint form; (2) the interest of the state in exercising jurisdiction over the foreign party within the circumstances of the case; (3) the procedural and substantive consideration as to the policies and laws of other nations that would be affected by the exercise of jurisdiction.

The *Asahi* case expressly resolves that it is not enough for purposes of constitutional analysis that the affected party have knowledge of the fact that its products entered in the stream of commerce of the state forum of the case. Upon considering these elements in the case before us we see several important and unequivocal analogies; (1) Alcan incurs in a disproportionate financial burden upon being subjected to the jurisdiction of the courts of Puerto Rico when it has *never done business in this jurisdiction and has no agent office, account or investment in Puerto Rico*; (2) the interest of the state is duly protected upon allowing plaintiff to pursue his claim against the retailer, importer, distributor or any of the similar link in the distribution chain that is doing business in Puerto Rico. Such entity in this case was B&B de Lares. It would then fall upon said defendant to pursue the third party claims in the forum appropriate for said purposes; (3) the procedural and substantive considerations also becomes significant in the circumstances of the present case.

It would be enough to consider what would happen if the foreign courts tried to exercise jurisdiction in a reverse situation. Let's assume that every year a contractor from Brasilia, Brazil, comes to Utuado and buys from a hardware store a hundred weight of metal cable shipped to Brasilia where he operates a link fence plant. Would the Utuado hardware be subject to the jurisdiction of the courts of Brazil if a complaint were presented in Brazil alleging damages suffered as a result of manufacturing defects in the materials used to make the fences? No, of course not! That is what it is referred to when we speak about traditional notions of fair treatment and substantial justice.

Alcan has not done business in Puerto Rico. Moreover, the Superior Court recognizes that there is no evidence to such effect. Under these circumstances and the doctrine in the case of *Asahi Metal*, the exercise in a jurisdiction over Alcan not only lacks basis, but it involves a great violation of the due process of law; a mandate protected under the Federal Constitution as well as Article II, Section 7, of the Constitution of the Commonwealth of Puerto Rico.

C. The Court Erred in Concluding that the Testimony of Eng. Simon Carlo Did Not Merit Credibility.

The Court devotes three pages of its judgment to the discussion of the testimony of Eng. Simon Carlo, Alcan's expert. Among its determinations the Court includes the following:

> "Engineer Carlo concluded his testimony explaining that, in his opinion, the pressure cookers he examined and about which he personally testified in court were, at present, in operational condition and may be used to cook once the corresponding rubber gasket was installed, but while he was examining the cookers at the office of Attorney Velez Cardona he was provided with a stove and told by attorney Velez would buy the rubber gasket as well as the weight so that engineer Carlo would put the cookers to work, he refused to make such tests, which to this court's judgment would have been a determining factor in evaluating credibility of his testimony." (*Exhibit 13*, p. 7)[3]

[3] Attorney Victor Velez Cardona *did not request* Eng. Simon Carlo to carry out any test as to operation of the cookers at the time of the inspection. The Superior Court's ruling constitutes a mistaken interpretation of the answer given by Eng. Simon Carlo to Attorney Velez Cardona's questions.

Plaintiffs never used nor presented in court any expert or scientific evidence. The main objective for which Alcan's contracts Eng. Simon Carlo is for him to render an expert opinion regarding the plaintiffs' allegation that the cookers had "exploded". Engineer Carlo told Alcan that with an ocular inspection of said cookers, which were always under the custody and control of plaintiffs, would be sufficient for him to render an opinion. As a matter of fact, in his testimony on the day of trial, engineer Carlo indicated said tests was unnecessary and inappropriate to be able to render an expert opinion regarding the occurrence.

Engineer Carlo answer as to whether the cookers had "exploded" and if they suffered from any defects that would have caused said "explosion" was a categorical no. It is plaintiffs' burden to present proof of a defect and that said defect was in fact proximate cause of the damages. However, and in total absence of such proof, the court rests on the alleged denial of the expert to carry out a test, that which he had no reason to carry out, to conclude that his unrefuted and irrefutable testimony merits no credibility. Although we emphatically deny that said test was requested, to rest upon some test not being carried out to refute the credibility of a highly qualified expert witness and who did not rest on such test to render his opinion, is unacceptable. As a matter of fact, Rule 82 of the Rules of Evidence, as well as the interpretative jurisprudence, have regulated the admissibility of experiments and scientific tests and subject them to strict requirements which would not permit the use of said tests in this case. Rule 82 of the Rules of Evidence requires that said experiment be carried out under substantially "equal or

similar" circumstances to those that existed at the moment when the cookers allegedly "exploded" in the residences of Mrs. Gertrudis Robles and Mrs. Iris B. Torres, something that would not have been feasible. (See, *Acosta Vargas v. Tio*, 87 D.P.R. 262 (1963) and *Cedeno v. Tropical City Industries*, 71 D.P.R. 626 (1950).

If plaintiffs' attorney had such interest in carrying out said tests, he should have contracted an expert, or maybe carried the test himself, and attempt to introduce the results into evidence under Rule 82. On the other hand, if the court at any time believed that said tests regarding the operation of the cookers was essential to be able to render a decision in this case, it had the power under Rule 59 of the Rules of Evidence to request that it be carried out in open court or to name an expert to make said tests.

We respectfully point out to this Honorable Supreme Court, that the Superior Court erred in concluding that the testimony of Eng. Simon Carlo lacks credibility. Eng. Simon Carlo performance was at all times characterized by the highest degree of professional excellence and integrity. The supposition of not having carried out a test which, as we have already seen, was unnecessary and inappropriate and had not been requested, cannot defeat the veracity of Eng. Simon Carlo's expert opinion.

D. The Court Erred in Granting the Complaint in Spite of There Not Being Any Admissible Evidence Regarding Defects in the Cookers and There Being No Causal Relationship Between Any Defect in the Cookers and the Alieged Damages Suffered.

In this case both plaintiffs involved in the alleged accidents, Iris B. Torres Pagan and Gertrudis Robles, alleged having suffered damages as a direct result of

"violent explosions" caused by an alleged construction defect in the "Rochedo" brand pressure cookers manufactured by Alcan. Plaintiff Iris B. Torres Pagan alleges that the pressure cooker "exploded" while she was in the process of cooling it under the faucet in the sink. On its behalf, plaintiff Gertrudis Robles alleges that the pressure cooker "exploded" while she was cooking some chickpeas on the stove.[4] However, it was the *right* side of Mrs. Gertrudis face that suffered damages. (See, *Pueblo v. Luciano Arroyo*, 83 D.P.R. 573, 582 (1961) (Honorable Raul Serrano Geyles):

> "We the judges should not, after all, be so naive as to believe statements that no one else believes." See, also, *In re: Lic. Roberto Velez Baez*, 91 J.T.S. 55 (June 13, 1991).

Plaintiffs' theory is that the alleged "explosions" were the direct result of a design defect in the "Rochedo" brand pressure cookers. Third party defendant-appellant sustains that the alleged explosions did not occur nor could have occurred as plaintiffs allege and that any resulting damage to plaintiffs is the result of the misuse of or their own negligent acts.[5] At trial plaintiffs did not present any expert proof to establish that the cookers in controversy suffered any defect nor that said defect was the proximate cause of the damages suffered by plaintiffs.

[4] Mrs. Gertrudis and her husband Adrian Roman, described how the "explosion" was so violent that it destroyed the entire left side of the gas stove. The alleged "destruction" of the stove when pot was structurally intact, suggests that if something exploded in this case, it was the stove and not the cooker. Also, as it appears from the findings of fact, the cooker was allegedly on the *left* burner while Mrs. Gertrudis tended the rice on the *right* burner. (*Exhibit 13*, at p. 3).

[5] Both plaintiffs express having many years of experience with pressure cookers and having read and followed religiously Rochedo's instructions for many years, for cooking as well as for cleaning them. (*Exhibit 13*, at pp. 3-5, *Exhibit 18*, *Exhibit 1* of Alcan.)

The jurisprudence at the federal as well as Puerto Rico level, clearly establishes that even in the cases of absolute liability, it is essential that the plaintiffs satisfy the burden of proof and establish presence the following essential elements:

1. That the product suffered from such a defective condition that it does not meet the average quality of similar products;

2. That the damages, in effect, be the result of the use of the product in controversy;

3. That the defective condition be the proximate cause of the damages suffered by plaintiff. 31 L.P.R.A., §5141; *Montero Saldana v. American Motors Corporation*, 107 D.P.R. 452 (1978); *Mendoza v. Cerveceria Corona, Inc.*, 97 D.P.R. 499 (1969); *McPhail v. Municipality of Culebra*, 598 F. 2d 603 (1st Cir. 1979); *Devitt Blackmore & Wolff*, §8202.

It was only possible to find in favor of plaintiffs if plaintiffs could establish, by the preponderance of the evidence, each and every one of these elements. Plaintiffs did not present any proof to establish the required elements.

In the course of this entire litigious proceedings, Alcan has recognized that in 1984 it voluntarily carried out a recall campaign of the "Rochedo" brand cookers, made between 1977 and 1982 that were not certified by Underwriters Laboratories. On the other hand, appellant, Alcan, has accepted at all times that the pressure cookers allegedly caused plaintiffs damages in the present case were designed and manufactured it.

The Superior Court, after having heard the convincing and unrefuted expert testimony by Eng. Simon Carlo, was faced with plaintiffs attorney's failed

attempt to introduce into evidence the publication regarding the voluntary recall campaign published in the local newspapers towards the end of 1983 or beginning of 1984. The court, after hearing the objections raised by the undersigned, rejected said publication from evidence "as to its content" and allowed that it be utilized for the "only and limited purposes" of asking engineer Carlo if said notice would somehow affect the opinion he had given the court on that day. Engineer Carlo reaffirmed his opinion that the cookers had not "exploded" and explained that the notice held no relation to the incidents described in the case.[6] Engineer Carlo went on to testify that both defendants explained in detail how the cookers were sealed, operating normally, and that they had at *no time* tried to open the cookers, and thus, examining the notification would lead him to confirm his expert opinion in the case. Notwithstanding the foregoing, and after having correctly rejected the contents of said documents into evidence, the court *rests solely on said notification* to conclude that there was a construction "defect" in the cookers. (*Exhibit 19*).

Pursuant to Rule 22 of the Rules of Evidence, any proof referring to repair or precautionary measures after the occurrence of an event is inadmissible to proof negligence culpable conduct relative to the event object of the litigation. Said Rule 22 provides:

> "When after the occurrence of an event precautionary or repair measures are taken which, if taken previously would have made the occurrence of the event less probable, evidence of said subsequent measures is inadmissible to prove neglect or culpable conduct in connection with the event. This

[6] The notice was aimed at the possibility that if sufficient force were applied, one may be able to open one of the cookers while still having some internal pressure. (Plaintiffs *Exhibit 4*).

does not prevent that said evidence be admissible for other pertinent purposes."

The main reason of the cited Rule is predicated upon the public policy to stimulate persons or, at least, not to dissuade them, from taking the pertinent steps to increase public safety. The courts have consistently applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in the safety rules and other similar aspects, all of which are duly covered under the language of Rule 22, equivalent to Rule 407 of the Federal of Evidence. Federal jurisprudence and the prevailing modern tendency hold that the Rule of exclusion of this type of evidence is applicable to cases of objective and/or absolute liability for manufacturing defects. See, *Grenada Steel Industries, Inc. v. Alabama Oxygen Company*, 695 F. 2d 883 (5th Cir. 1983); *Hall v. American SS Co.*, 688 F. 2d 1062 (6th Cir. 1982); *Joseph v. Harris Corp.*, 677 F. 2d 985 (3rd Cir. 1982); *Cann v. Ford Motor Co.*, 658 F. 2d 54 (2nd Cir. 1981) *cert. denied* S. Ct. 2036, 72 L. Ed. 2d 484 (1982); *Warner v. UpJohn Co., Inc.*, 628 F. 2d 848 (4th Cir. 1980); *Roig v. Star Shopper Co.*, 584 F. 2d 1124 (1st Cir. 1978) *cert. denied* 440 U.S. 916, 99 S. Ct. 1234, 59 L. Ed. 2d 466 (1979). The courts reasoning reflecting this interpretation is more adequately summarized in *Warner v. UpJohn, supra*, at pp. 857-858, wherein the following it set forth:

> "The defendant argues that we should adopt the rule of some courts, that the rule against admitting evidence of subsequent remedial measures not apply in product liability cases. (Citations omitted). We are not persuaded. The court assumes that the product is defective, and thus overlooks the situation where the product is not defective or could be made better. The manufacturer who undertakes precautionary measures in this setting will face the risk of liability

> for an injury caused by the earlier non-defective version of the product based on evidence of his subsequent act which made the product safer but in no way supports an inference that the initial version of the product was defective."

All the information contained in the aforementioned document relative to the "Rochedo" pots and the voluntary recall campaign effected by the appellant consists of evidence of subsequent remedial measures which would have tend to make a non-defective product a safer one. Such document is inadmissible to establish negligence or fault in connection with the incidents giving rise to the present claims.

On the other hand, said documentary evidence, rightly excluded by the Superior Court, does not need the requirements of materiality and pertinence required by the Rules of Evidence. Rule 18 establishes that non-pertinenet evidence is inadmissible. Said Rule also requires that the fact which existence is trying to be established, should in turn refer to a matter in controversy or the credibility of a witness or declarant. The information contained in the notification is totally immaterial to the determination of whether the cookers object of the present case could or could not have been defective when they were sold. Plaintiffs do not establish any connection between said recall campaign and the occurrences which allegedly gave rise to the damages.

It has been held that evidence of subsequent remedial measures when acquiring the alleged defective product is immatierial in determining the existence of a defect. In this sense the decision in the case of *Grenada Steel Industries v. Alabama Oxygen Co., supra*, at pp. 887-888, establishes as follows:

> "...the real question is whether the product or its design was defective *at the time the product was sold.* The jury's attention should be directed to whether the product was reasonably safe at this time if was manufactured... The introduction of evidence about subsequent changes in this product or its design threatens to confuse the jury by directing its attention from whether the product was defective at the relevant time to what was done later.
>
> Interpreted to require the evidence to focus on the time when the product was sold, Rule 407 would conform to the policy expressed in Rule 403, the exclusion of relevant information if its probative value is substantially outweighed by the danger of confusion...
>
> ...for these reasons, we follow the path taken by the First, Second, Third, Fourth and Sixth, Circuits and hold Rule 407 applicable to strict liability cases." (Emphasis supplied).

In absence of allegations and evidence that the aforementioned recall campaign would have had any connection with any alleged defects of the pressure cookers in controversy and/or establishing as proximate cause any alleged defect that was the object of the recall campaign, the most basic requirements of materiality are not satisfied. See, *Jordan v. General Motors Corp.*, 624 F. Supp. 72 (1985); *Vockie v. General Motors Corp.*, 66 F.R.D. 57 (1975), confirmed what that opinion in 523 F. 2d 252 (3rd Cir. 1975); and *Muniga v. General Motors Corp.*, 102 Mich. App. 755, 302 N.W. 2d 565 (1980).

Lastly, we point out, that the information contained in the controverted recall notice is inadmissible as hearsay pursuant to Rules 60 and 61 of the Rules of Evidence. The aforementioned document constitutes a

statement made outside the court that is being offered to establish the veracity of an issue in controversy. Any statement that fits this description is inadmissible as hearsay under Rule 61.

No evidence having been presented, and the court not having had available any evidence relative to the existence of a manufacturing defect which would have been the proximate cause of the damages suffered by plaintiffs in this case, it is compelling to conclude that the elements necessary to attribute liability under the doctrine of absolute liability to the appellant Alcan are not met, and the judgment entered by the Superior Court in these cases should be set aside.

E. The Court Erred in Granting Special and Permanent Damages in Favor of Gertrudis Robles and Ordering Defendant to Pay Expenses and Attorneys Fees.

1. Improper Grant of "Permanent Damages" to Gertrudis Robles.

As we have pointed out and as appears from the judgment entered by the Superior Court, the evidence of damages in these cases was limited strictly to the testimony of the plaintiffs themselves, hence, their legal representation did not present any medical expert, nor any admissible documentary evidence as to these aspects. The court so concluded in its judgment when it expressed that:

> "Said plaintiffs *did not present any medical evidence* regarding the nature and scope of the damages suffered. Plaintiffs made a *failed attempt* to introduce into evidence photocopies of unauthenticated medical records which this court at the request of defendant, *did not admit into evidence. . .*" (*Exhibit 13*, p. 6). (Emphasis supplied).

In the case of Gertrudis Robles, the granting of "permanent damages" is contrary to the expressed conclusion of the Superior Court which among its findings of facts included the following:

> "The court takes notice regarding the fact that on the day of the hearing there were no visible burns scars on the face of Mrs. Gertrudis." (*Exhibit 13*, at p. 4).

It is clearly established that in a complaint for damages, it is up to the plaintiff to put the trier of facts in a position to determine, without having to turn to speculations, the damages actually suffered. *Rodriguez v. Serra*, 90 D.P.R. 776, 778 (1964); *Cubero v. Ins. Co. of P.R.*, 99 D.P.R. 748, 752 (1971). In view of the foregoing, it is necessary to conclude that the granting of $3,000.00 in permanent damages to Mrs. Gertrudis is the result of speculation and is not based on any admissible evidence presented to the court.

Likewise, the granting of $500.00 for the estimated damages to Mrs. Gertrudis stove is not justified. To these effects, the court held:

> "Mrs. Gertrudis describes the explosion as something terrible, stronger than the noise of a firecracker and with such violence that it destroyed the left side of the gas stove on which the cooker was placed, which the damages he estimated in $500.00." (*Exhibit 13*, at p. 4).

The court did not receive any documentary evidence setting the estimated damages at $500.00. Said category was not alleged in the original complaint nor was it set out in the pre-trial report. (*Exhibits 1 and 5*). As required by Rule 7.4 of the Rules of Civil Procedure. See, *Diaz v. Marshack Auto Dist., Inc.*, 95 D.P.R. 690 (1968). The granting of the $500.00 category for the alleged "destruction of the stove" should, therefore, be reversed.

2. The groundless granting of attorneys fees and expenses in favor of plaintiffs.

As it is well established that the granting of legal fees under Rule 44.1(d) of the P.R. Rules of Civil Procedure, is limited exclusively to circumstances where the loosing [sic] party has forced its opponent to a judicial battle obstinately, and with temerity. Such is not the case before us. We begin by pointing out the complete absence of a determination to such effects in the judgment, *which is an essential requirement* under Rule 44.1(d) of the Rules of Civil Procedure and the applicable interpretative jurisprudence. *Vega v. Luna*, 90 J.T.S. 71 (May 17, 1990); *Fernandez Marino v. San Juan Cement*, 108 D.P.R. 713 (1989); and *Urutia v. A.A.A.*, 103 D.P.R. 643 (1975). On the other hand, we point out that in the judgment rendered by the Superior Court, although inexplicably adverse to the appellant, the court agrees with all the statements of facts and law upon which the defendant Alcan based the defense of its case. A quick reading of said judgment confirms it. Alcan did not during the course of the case litigate any aspect that did not set forth a substantial and meritorious controversy, and therefore, the granting of expenses and attorneys fees should be reversed.

WHEREFORE, it is respectfully requested that this Honorable Supreme Court reverse the judgment entered by the Superior Court, Utuado Section, on June 28, 1991.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, August 12, 1991.

I CERTIFY: That on this same date copy of the foregoing document was sent by certified mail, return receipt requested, to Victor Velez Cardona, Esq., Calle Arana #3, Lares, Puerto Rico 00669.

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EUGENIO C. ROMERO
P.R. Bar No.:7038

COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
SUPREME COURT

Case: RE-91-0433

Orig. Case: CS-84-1084

TORRES PAGAN, IRIS B.
Appellee,
v.
ALCAN ALUMINIO DO BRASIL, S.A.,
Appellant.

DAMAGES

ROMERO DE JUAN EUGENIO C
P.O. BOX 70364
SAN JUAN, PR 00936

NOTIFICATION

I CERTIFY THAT IN CONNECTION WITH THE REQUEST FOR REVIEW, THE COURT ENTERED THE MANDATE ATTACHED:

******NOTICE TO THE ATTORNEYS AND THE PARTIES******

MANDATE SENT TO SUPERIOR COURT.
THIS LETTER IS ONLY FOR YOUR KNOWLEDGE.

VELEZ CARDONA VICTOR A—CALLE ARANA #3-
LARES, P.R. -00669
GENERAL SECRETARY-SUPERIOR COURT-
UTUADO, PUERTO RICO-00641

SAN JUAN, PEURTO RICO, THIS 23RD DAY OF OCTOBER 1991

FRANCISCO R. AGRAIT LLADO
GENERAL SECRETARY

s MARGARITA (illegible)
Assistant Secretary

ORDER OF THE SUPREME COURT OF PUERTO RICO DENYING REQUEST FOR REVIEW

(Dated October 4, 1991)

No. RE-91-433

IN THE SUPREME COURT
OF PUERTO RICO

Iris B. Torres Pagan, Gertrudis Robles Perez and Adrian Roman,
Plaintiffs-Appellees,

v.

Alcan Aluminio Do Brasil, S.A.
Defendant-Appellant

REVIEW

RESOLUTION

San Juan, Puerto Rico, this 4th day of October, 1991.

The request for review filed by defendant-appellant, denied.

The Court agreed and the General Secretary so certifies. The Chief Judge, Mr. Pons Nunez did not intervene.

/s/ FRANCISCO R. AGRAIT LLADO
General Secretary